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56 | Acknowledgement of Trust

The need for an acknowledgement of trust in an SMSF hits many by surprise. What is an acknowledgement of trust about? Why and when do we need an it for an SMSF? And how is it different from a declaration of trust?

Acknowledgement of Trust

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The Rule

We may need an acknowledgment of trust to comply with Regulation 4.09 of the SIS Regulations and s52 (2) (g) of the Superannuation Industry (Supervision) Act 1993. Both basically stipulate the same thing: Trustees of SMSFs must keep fund assets separate from personal assets.

Regulation 4.09 SISR

“A trustee of a regulated superannuation fund that is a self managed superannuation fund must keep the money and other assets of the fund separate from any money and assets...:

(a) that are held by the trustee personally; ...”

s52 (2) (g) SIS Act 1993

“...(g) to keep the money and other [assets](#) of the [entity](#) separate from any money and [assets](#), respectively:

(i) that are held by the [trustee](#) personally; ...“

Section 34 of the SIS Act provides that a person who intentionally or recklessly contravenes this standard is guilty of an offence punishable on conviction by a fine not exceeding 100 penalty units – this translates to a penalty of \$11,000.

Separation

How do we keep funds separate when it is the trustee who legally owns the assets? Remember that the fund itself is not a legal entity, but a relationship. The SMSF can't own any assets as such. It is the trustee who legally owns the assets. So how do we keep the trustee's assets separate from the fund's assets?

The answer is three letters: “ATF” meaning “As Trustee For”. Sometimes it might also be “ITF” meaning “In Trust For”. These three letters show that the SMSF assets are held in the name of the trustees on behalf of the fund. You usually see the ATF acronym on bank account statements or share certificates.

So there is no s52 issue if trustees hold non-property Australian assets and these are correctly recorded as ATF. But it is not always that straight-forward.

Issue No. 1

What happens if the relevant asset register doesn't list the ATF relationship because they don't out of principle? And instead it just lists the individual or corporate trustee without mentioning the trust arrangement? Car registration and Bitcoin registers are an example. How do you comply with s52 (2) (g) of the SIS Act then?

Issue No. 2

What happens if the assets are placed overseas in countries that don't do ATF? That don't recognise a trust relationship? Remember that Australia inherited the concept of trusts from England. Countries outside the Commonwealth don't do trusts. And an SMSF is a form of trust. What do we do then?

Issue No. 3

Some land title offices don't recognise a trust arrangement, for example in NSW and Victoria. They only show the legal owners of the property, being the trustees, without mentioning that the property is held by the trustees on behalf of the SMSF.

Let's say you have Bob and Sally as individual trustees of their SMSF. Their SMSF purchases a shop in NSW. The NSW land title office will issue a title deed with Bob and Sally listed as the owners. There will be no mention on the title deed that Bob and Sally are holding the property on behalf of their self managed super fund. So how do Bob and Sally show that they are holding the shop on behalf of the SMSF? How do they comply with s52(2)(g) of the SIS Act?

Declaration or Acknowledgement of Trust

The answer to these issues is a declaration or acknowledgement of trust. This declaration or acknowledgement will show that the owners are holding the asset on behalf of the SMSF and not to their own benefit. They declare that the SMSF is the beneficial owner and not them, although the asset is legally in their name.

What is the difference between a declaration of trust and an acknowledgement of trust? They are almost the same with one important difference. Timing. A declaration of trust happens before the purchase of the asset. An acknowledgement happens after. So the organised among us will do a declaration of trust. The normal mortals will run with an acknowledgement of trust.

So a declaration or acknowledgement of trust will fix the issues in most cases, but there are two scenarios where there is no clear answer.

Issue No. 4

A declaration or acknowledgement of trust should fix the s52 (2) issue if... and this is an IF in capital letters... if there is a genuine reason why the trust relationship is not listed. A land title office or an overseas location not registering a trust relationship is a genuine reason.

But what if the trustees transferred personal assets into the SMSF without ever recording the trust relationship? What if the ATF is missing due to a mistake or oversight? Can you still fix it with an acknowledgement of trust? There is no clear answer. It will come down to whether your SMSF auditor is happy to accept an acknowledgement of trust or not. There is no case law and no ruling that clarifies this issue.

Issue No. 5

So far we assumed that the owners of the asset are the trustees of the SMSF. But what happens if this is not the case? What happens if the asset is held in individual names but the SMSF has a corporate trustee? Or vice versa?

This actually happens more often than you might think. Bob and Sally might have bought the shop years ago. They later established their SMSF and contributed the shop. The SMSF either had a corporate trustee to start with or they changed from individual trustees to corporate trustee since that is industry practice. So now the shop is still in their own individual names but the trustee is Smith Pty Ltd. So the legal owners of the asset and the trustees of the SMSF are not the same entity. Will an acknowledgement of trust still fix this?

There is no case law to the best of our knowledge. We are not aware of any private ruling. It comes down to whether the auditor lets this one pass. And whether the ATO picks it up. So the set up is risky.

The basic question is whether somebody else but the trustee can hold an asset on behalf of a trust or SMSF. That is the question. So far we got this past the auditors. To be certain we probably should apply for a private ruling from the ATO.

To finish we wanted to give you an example text. It is a template we use in our daily work, but please check with your SMSF auditor or lawyer to be certain that your declaration or acknowledgement is water-tight.

Example

Here is the example of an acknowledgement of trust. We are assuming that Bob and Sally are individual trustees of their super fund. But please adjust for a corporate trustee.

“This acknowledgment of trust is made by Bob Smith & Sally Smith (“the Trustees”) as *trustees for* Smith Superannuation Fund (“the Fund”) of: 100 Whatever Street, Wherevercity, NSW 2000.

This acknowledgement of Trust has been created in order to demonstrate the correct ownership of investments held by the above self managed superannuation fund (SMSF). The Trustee of the Fund acknowledges it must record the ownership of all assets of the Fund in such a way as to distinguish and keep separate the assets of the Fund from other assets that the Trustee holds in their personal capacity. [paragraph 52(2)(d) of the *Superannuation Industry (Supervision) Act 1993*]

This acknowledgement of trust document has been created because certain Fund assets do not record the correct ownership. The Trustee declares that the following asset(s):

Asset	No of shares/units	Date of purchase
xxxx Limited (SRN 000000)	2000 shares	24/07/06

is (are) held on behalf of the Fund.

The Trustee further declares:

- Bob and Sally Smith hold the asset in their name on behalf of the Fund for the sole benefit of the Fund;
- there is sufficient evidence that to support this asset is an investment of the Fund;
- this document does not constitute a resettlement for Stamp Duty or Capital Gains Tax;

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- this document does not deprive the Fund members and/or any beneficiaries of the rights of beneficial ownership of the asset(s) stated above; and
- that the Trustee believes this document demonstrates the ownership of the asset has been recorded in such a way as to distinguish and keep separate the assets of the Fund from other assets of the Trustee held in their personal capacity.

.....

.....

Bob Smith

Sally Smith

Date: / /

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